No. 13225

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CROFTON DIESEL ENGINE COMPANY, INC., a corporation, and AL LARSON BOAT SHOP, a corporation,

Appellants,

vs.

PUGET SOUND NATIONAL BANK OF TACOMA, a corporation, and ETS-HOKIN & GALVAN,

Appellees.

OPENING BRIEF FOR APPELLANTS.

EKDALE, SHALLENBERGER & TONER,
ARCH E. EKDALE,
GORDON P. SHALLENBERGER,
GEORGE E. TONER,
614 South Pacific Avenue,
San Pedro, California,
Proctors for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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OPENING BRIEF FOR APPELLANTS.

This appeal is from a final decree in Admiralty of the United States District Court for the Southern District of California, Central Division, Honorable William C. Mathes, presiding, which adjudged that certain valid maritime liens and preferred mortgage liens existed upon a fishing Vessel, FLYING CLOUD, and ordered recovery in certain amounts by Appellee, Puget Sound National Bank of Tacoma and Appellant Al Larson Boat Shop from proceeds of the sale of the Vessel held in the registry of the Court. This controversy is between Appellants, maritime lien holders, and Puget Sound National Bank of Tacoma, whose preferred mortgages were adjudged senior to Appellants' liens; Appellee Puget Sound National Bank of Tacoma was allowed to satisfy its claims from the proceeds of the sale, with a small balance to one of Appellants; the balance of Appellants' claims were reduced to worthless personal judgments. This appeal followed.

Summary of the Pleadings.

The original action was by Appellee, Puget Sound National Bank of Tacoma, as Libelant against the American Oil Screw FLYING CLOUD, her engines, tackle, apparatus, boats, furniture and equipment, and Peter Radic and John Kremenic, her owners, for foreclosure of two preferred mortgages. Appellant Crofton Diesel Engine Company, Inc., hereinafter referred to as "Appellant Crofton," and Appellant Al Larson Boat Shop, hereinafter referred to as "Appellant Larson," intervened, setting up their maritime liens and Appellant Crofton's preferred ship's mortgage; Ets-Hokin & Galvan intervened, setting up maritime liens; John Marumoto intervened, setting up a salvage lien (Ets-Hokin & Galvan and John Marumoto have not appealed, and their presence in the case will henceforth be desregarded). The original Respondents did not appear. Their defaults were taken. The Vessel was duly sold by the Marshal under Admiralty Rule 12 for forty-one thousand and no/100 dollars ($41,000.00), and the proceeds deposited in the registry of the Court. After trial, the District Court made an Order for Findings and Decree [A. 72] by which he ordered:

1. Foreclosure of Appellee's Preferred mortgages plus an additional sum of one thousand four hundred sixty-two and 39/100 dollars ($1,462.39) for insurance premiums and three thousand five hundred and no/100 dollars ($3,500.00) for Attorneys' fees;

2. Foreclosure of Appellant Crofton's preferred mortgage, plus an additional six hundred seventy-five and no/100 dollars ($675.00) for Attorneys' fees, and an award of two hundred twenty-nine and 27/100 dollars ($229.27) for supplies and materials;

3. An award of three thousand one hundred ninety-seven and 76/100 dollars ($3,197.76) to Appellant Larson;

and fixed priorities as follows:

1. All claims secured by Appellee's first and second preferred mortgages, including the sum of one thousand four hundred sixty-two and 39/100 dollars ($1,462.39) advanced to cover insurance premiums, taxable costs, and three thousand five hundred and no/100 dollars ($3,500.00) for Attorneys' fees;

2. The claim of Appellant Larson for one thousand thirteen and 06/100 dollars ($1,013.06);

3. The claim of Appellant Crofton for two hundred twenty-nine and 27/100 dollars ($229.27);

4. The claim of Appellant Larson for one thousand six hundred sixty-four and 89/100 dollars ($1,664.89);

5. All claims secured by the mortgage of Appellant Crofton, including the sum of six hundred seventy-five and no/100 dollars ($675.00) for Attorneys' fees;

6. The claim of Appellant Larson for fifty-five and 14/100 dollars ($55.14);

7. The claim of Appellant Larson for fifty-nine and 55/100 dollars ($59.55);

8. The claim of Appellant Larson for five and 12/100 dollars ($5.12).

Findings of Fact and Conclusions of Law [A. 74] were entered, and by the Interlocutory Decree [A. 87] and Final Decree [A. 94] it was decreed that there was to be paid from the funds in the Registry of the Court, the sum of thirty-nine thousand five hundred three and 36/100 dollars ($39,503.36) to Appellee, and the sum of nine hundred seventy-one and 29/100 dollars ($971.29) to Appellant Larson. Appellant Larson was awarded an *in personam* deficiency judgment in the sum of two thousand two hundred twenty-six and 47/100 dollars ($2,226.47) against the defaulting owners; Appellant Crofton was awarded a similar judgment in the sum of seven thousand nine hundred ninety-eight and 22/100 dollars ($7,998.22).

Appellants Crofton and Larson have appealed.

Statement as to Jurisdiction.

Admitted allegations in the pleadings show that the causes set forth in the libel and intervening libel are for foreclosure of preferred ship's mortgages and maritime liens, of which the District Court had jurisdiction by virtue of the constitutional grant of Admiralty Jurisdiction (Art. III, Sec. 2); Chapter 85 of the Judicial Code (28 U. S. C. A., Sec. 1333(1)); and the exclusive grant of jurisdiction of the Ship Mortgage Act (46 U. S. C. A., Sec. 951). The jurisdiction of this Court to review the final decree of the Court rests upon Chapter 83 of the Judicial Code (28 U. S. C. A., Sec. 1291), Assignments of Error [A. 98], Petition for Appeal [A. 97], Order Allowing Appeal [A. 100], Notice of Appeal [A. 100], Citation on Appeal [A. 101], all duly served and filed within the statutory period.

Statutory Background.

The Statutes which Appellants consider applicable are the following sections of the Ship Mortgage Act, 1920 (46 U. S. C. A., Secs. 911-984), particularly:

922. Preferred Mortgages.

953. Preferred Maritime lien; priorities; other liens.

971. Persons entitled to lien.

972. Persons authorized to procure repairs, supplies and necessaries.

973. Notice to person furnishing repairs, supplies and necessaries.

974. Waiver of right to lien.

These sections are quoted verbatim in the Appendix.

Statement of Facts.

Appellee took from the owners of the Fishing Vessel Flying Cloud, as security for a note, a certain mortgage on the Vessel [Libelant's Exhibit 7] on Treasury Department printed form No. 1348 [Libelant's Answer to Interrogatory No. 3; A. 56] completing the blanks and typing the word "Preferred" ahead of the printed words "Mortgage of Vessel." Kazulin Cole Shipbuilding Corporation also took a similar mortgage, on an identical form, as security for a loan [Libelant's Exhibit 8]. In both of these mortgages, there appears the following provision:

> "But if default be made in such payments, or in any one of such payments, or if default be made in

> the prompt and faithful performance of any of the covenants herein contained, or if the said party of the second part (Appellee) shall at any time deem itself in danger of losing its debt . . . or if said first part*ies* shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of *a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of the date incurred* . . . the second party is hereby authorized to take possession of said goods" etc. (Italics indicate typewritten matter inserted in printed form.)

It is important that the mortgagors in possession of the vessel were not specifically prohibited by the forms of these mortgages from incurring liens for goods, wares and services. On the contrary, expressly or by implication, from the requirement to pay within thirty days a "reasonable sum for strictly current operation and repairs," they are specifically authorized to "run the vessel in debt."

These "preferred" mortgages were duly recorded on August 19, 1948, at 4:15 P. M. and 4:20 P. M. respectively, at the office of Collector of Customs, Tacoma, Washington.

On October 19, 1949, Kazulin-Cole Shipbuilding Corporation assigned its note and mortgage to Appellee, Puget Sound National Bank of Tacoma.

Subsequently, Appellants Larson and Crofton supplied the Vessel with goods, wares and services on order of the

Vessel's owners. (Intervener-Appellants' Offer to Stipulate [A. 67], paragraphs 5 and 6; and Libelant-Appellee's Acceptance (Partial) of Offer to Stipulate [A. 71] paragraph 1.)

Appellant Crofton, while the Vessel was being "run in debt" took a note for six thousand five hundred and no/100 dollars ($6,500.00) and preferred ship's mortgage [Crofton's Exhibit "A"] as security for the liens for goods, wares and merchandise it had furnished (see offer to Stipulate, paragraph 5, and Acceptance (Partial)) [A. 67 and 71]. The time schedule and itemized list of Appellants' maritime liens appears in the District Court's Findings of Fact and Conclusions of Law [A. 74, par. 24; A. 81].

It is important that Appellant Crofton's preferred ship's mortgage contains, as does any well drawn preferred ship's mortgage, the following specific, unambiguous prohibition of the authority of the owner-mortgagor in possession to incur any liens [see Crofton's Exhibit "A," Art. V, which appears also [at A. 38] as an Exhibit to Libel in Intervention]:

> "Article V. That neither the mortgagors nor the master of the vessal shall have any right, power or authority to create, incur, or permit to be placed or imposed on the vessel any liens whatsoever other than for crew's wages, wages of stevedores and salvage. The mortgagors shall carry a properly certified copy of this mortgage with the ship's papers and shall exhibit the same to any person having business with the said vessel which might give rise to any

lien other than for crew's or stevedores' wages or salvage."

Upon default in payments by the owners, Appellee-Libelant libeled the Vessel to foreclose its mortgages and Appellant intervened to foreclose their maritime liens and preferred ship's mortgage.

Questions Involved.

The only question involved is as to the priority of Appellants' or Appellee's liens. Are Appellants' liens senior to Appellee's mortgages?

Appellants believe that the answers to the following questions determine this appeal:

1. Is the Appellee's mortgage a "preferred" ship's mortgage?

2. If so, are the Mortgagor-owners in possession authorized by the terms of the mortgage to incur maritime liens on the vessel for goods, wares and services furnished by Appellants on the credit of the Vessel at the request of the owners?

3. Does Appellee, by the terms of its mortgage, waive whatever preferred status it might have had to Appellants' maritime liens?

4. Do the same principles applicable to charter party cases and other similar situations require a preferred ship's mortgage expressly to prohibit the mortgagor-owner in possession of a Vessel from incurring liens for credit extended to the Vessel?

Summary of Argument.

There are no disputed issues of fact in this case. The only question, one of law, is whether upon the agreed facts the Appellants' maritime liens for goods, wares and services are junior or senior to Appellee's two mortgage liens. There is, therefore, little, if any, presumption in favor of the correctness of the District Court's decree. Appellants have only the usual burden that goes with being an Appellant.

We have here a conflict between the supplier who furnishes goods, wares and services upon order of the person in possession of a vessel, and the mortgagee under a document he hopes is a preferred mortgage. Both types of liens are protected by statute.

This contest of liens is identical to the well recognized conflict between the supplier and the owner of a vessel, who has chartered it. The supplier seeks the credit of the vessel while the owner seeks to limit the charterer to operation on his own credit. The well recognized rule in this Court and in the Supreme Court, is that the supplier's rights are junior to the owner's, if the charter party has specifically prohibited the person in possession from incurring liens. The supplier is bound to ascertain the authority of the person in possession. The same rule of thumb is applied in conditional sales, consignment cases, and mortgage cases. All a mortgagee, conditional vendor, or chartering owner need do is include a simple and clear prohibitory clause in the document by which a person is placed on a vessel as ostensible owner.

If the person in possession is authorized, expressly or by implication, to create liens, the supplier's lien is entitled to precedence. The supplier is, of course, bound

by the terms of the mortgage or other agreement, whether he knows of its terms or not, because he is required to exercise due diligence to ascertain the authority of the person with whom he deals. In this case, the persons in possession were, expressly or by implication, authorized to incur liens on the vessel by the inclusion in the mortgage of words amplifying an "acceleration" clause. If the mortgagors "run the vessel in debt" in an amount exceeding a "reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of date incurred," the mortgagee can declare a default. If this clause is not express authority to "run the vessel in debt," it is at least an ambiguity which should be resolved against Appellee who chose the language and drafted the document. Appellants cannot be required to resolve at their peril the uncertainty which laymen would have as to the legal effect of this language.

Appellee has, by the use of this ambiguous language, waived the priority its mortgage could have had over liens for operations and repairs.

Finally, in balancing the relative positions of the supplier and the mortgagee, it is evident that a mortgagee, in this situation, could easily protect himself by a simple, unambiguous prohibiting clause in his mortgage. He did not do so, but by implication, allowed the supplier to infer that the mortgagor in possession was authorized to "run the vessel in debt," if only for thirty days. He is, therefore, in no position to complain that the supplier has a senior lien. The District Court, having held the mortgagee's liens to be prior to Appellants' liens, has misinterpreted the applicable statutory and case law.

ARGUMENT.

I.

There Is Slight, If Any, Presumption of the Correctness of the District Court's Decree.

Appellant recognizes the usual rule that an Appellant faces the burden of showing that the District Court's decree is erroneous. In the majority of appeals, the District Court's decree is based upon a conflict of testimony, which it has resolved by Findings of Fact. This Court has, on many occasions, stated that when all the witnesses have testified in open court, the presumption of correctness is very strong. This strength decreases in a curve, as there are fewer "live" witnesses, until the "question-of-law-only" case is reached, when the presumption has little, if any, vitality.

> *Ernest H. Meyer* (C. C. A. 9th), 84 F. 2d 496, 1936 A. M. C. 1179 (cert. den. 299 U. S. 600, 57 S. Ct. 193, 81 L. Ed. 442);
>
> *Johnson v. U. S.* (C. C. A. 9th, 1947), 160 F. 2d 789, 1947 A. M. C. 765 (rev. on other grounds, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468).

Here we have solely a question of law. The execution and recording of the mortgages and the incurring of the maritime liens are all undisputed [Agreed Statement of Facts, A. 104; Offer to Stipulate, A. 66; Libelant's Acceptance (Partial) of Offer to Stipulate, A. 71]. The exhibits speak for themselves [Appellee's "preferred" mortgages, Libelant's Exhibits 7 and 8; Appellant Crofton's Preferred Mortgage, Crofton's Exhibit "A," A. 33-

48]. This Court, in determining the relative priority of Appellants' liens and Appellee's mortgage, has before it only these questions of law—What is the legal effect of these "preferred" mortgages? What is the status of Appellants' maritime liens?

II.

Strong Public Policy Favors Maritime Liens of Suppliers of Necessaries to Vessels.

The Laws of Oleron (Art. I, 30 Fed. Cas. p. 1171), Wisbuy (Art. VI, XIII, 30 Fed. Cas. p. 1190), Hanse Towns (Art. LX, 30 Fed. Cas. p. 1201), Marine Ordinances of Louis XIV (Title First, Sec. XIX, 30 Fed. Cas. p. 1204, Title Fifth, Secs. II, III, 30 Fed. Cas. p. 1210; 30 Fed. Cas. p. 1171 *et seq.*) found it proper to make provision for extension of credit to vessels in a foreign port. The maritime lien has developed in Admiralty through the intervening centuries. It is security for the supplier and repairman who may not care to trust the owner, but is willing to take his chance on the credit and security of the ship he supplies or repairs. In 1910, Congress passed "An Act Relating to Liens on Vessels for Repairs, Supplies and Other Necessaries" (c. 373, par. 1, 36 Stat. 604, June 23, 1910) by the terms of which, the furnisher of repairs, supplies or other necessaries, including the use of a dry dock or marine railway to a foreign or domestic vessel upon order of the owner or a person authorized by the owner, should have a maritime lien on the vessel without the necessity of proving that credit was given to the vessel. This act, in its present form, now appears in the Ship Mortgage Act, as subsections P, Q and R of C. 250, par. 30, 41 Stat. 1005, June 5, 1920 (46 U. S. C. A. Secs. 971, 972, 973). These sections appear verbatim in the Appendix.

Appellant Crofton's position is that of a supplier of goods, wares and services, who asserts a maritime lien therefor. The note and mortgage were given and taken as security for the lien [see Offer to Stipulate, par. 5, A. 67, and Acceptance (Partial) of Offer to Stipulate, par. 1, A. 71].

Under this agreement, in this case, and upon the principles set forth in *The Bergen* (C. C. A. 9th, 1933), 64 F. 2d 877, 1933 A. M. C. 877, the mortgage being given as security, the maritime lien was not merged by taking of additional security.

The Supreme Court, in the case of *The Stjerneborg* (*Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Calif.*) (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197, in affirming the Ninth Circuit Court's decision (106 F. 2d 896), said of the public policy behind the maritime lien (at p. 276):

> "The origin of the maritime lien is the need of the ship. *Piedmont & G. C. Coal Co. v. Seaboard Fisheries Co.,* 254 U. S. 1, 65 L. Ed. 97, 41 S. Ct. 1, *supra.* The lien is given for supplies which are necessary to keep the ship going. The materialman when furnishing such supplies on order of the charterer is charged with knowledge of the terms of the charter party when he can ascertain them, but when it appears that by these terms the charterer has direction and control of the vessel and that he is the one to obtain the essential supplies and that there is no prohibition of the creation of a maritime lien, the materialman is protected by the terms of the statute. He furnishes the supplies on the order of the person authorized to obtain them and he is entitled to rely on the credit of the one who gives the order."

III.

Strong Public Policy Likewise Protects Holders of Preferred Ship's Mortgages.

Prior to 1920, United States vessels could not be mortgaged satisfactorily, in that maritime liens incurred by the mortgagor-owners in possession became senior to the lien of the mortgagee. This situation was corrected by the Ship Mortgage Act (June 5, 1920, C. 250, par. 30, 41 Stat. 1000) which by its terms (subs. D) (46 U. S. C. A. Sec. 922, Historical Note) was limited to preferred ship's mortgages on vessels of the United States "over 200 tons gross and upwards." The act provided that upon endorsement on the vessel's papers, recording with the Collector of Customs at the port of documentation of the vessel, and compliance with certain other conditions, the mortgage was to be called a "preferred mortgage."

In 1935, by amendment, application of the Statute to vessels over 200 tons was deleted (June 27, 1935, c. 319, 49 Stat. 424, 46 U. S. C. A. Sec. 922). It is now available to "any vessel of the United States."

Prior to 1935, it was possible to obtain a preferred mortgage upon very few fishboats, *i. e.,* those whose tonnage exceeded 200 gross tons; therefore, mortgagees who lent money on vessels under 200 tons sought to protect themselves as best they could. They developed a form "Mortgage of Vessel," form No. 1348 of Treasury Department [see Libelant's Exhibits 7 and 8], by the terms of which an "acceleration clause" was included in these terms:

> "or if said first party shall suffer and permit the vessel to be run in debt in an amount exceeding in

the aggregate the sum of ..... Dollars, the second party is hereby authorized to take possession," etc.

The mortgagees recognized that the mortgagors in possession were able to create maritime liens senior to the mortgagees' rights, but by being alert they could put the mortgage in default if the amount exceeded the ceiling they set. On occasion, a time limitation was set within which the liens had to be paid. The thirty day provision used by the Appellee was not infrequent. The mortgagee could thus set an amount or a time limit which he was content to risk. It was not satisfactory, but it was the best he could do. He could not get a preferred mortgage, and he could not prevent the mortgagor from incurring liens. By the 1935 amendment, all vessels of the United States were made subject to mortgage. Form No. 1348 is now obsolete, but is sometimes used as a makeshift "preferred" mortgage.

We must not lose sight of the fact that the Ship Mortgage Act is in derogation of the Common Law. It makes a material change in the traditional status of the maritime lien, and of course, requires strict compliance by the mortgagee with the requirements of the act. This attitude is reflected in the case of *Morse Dry Dock and Repair Co. v. Northern Star* (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, in which a custom officer's failure to endorse the mortgage on the vessel's papers prevented the mortgage from being "preferred" to the subsequently attaching maritime liens. This is hard law, but entirely in keeping with the usual attitude of the Court to this type of statute and the requirement of strict compliance with its terms.

IV.

The Situation of a Mortgagor Is Much the Same as That of a Charterer, Conditional Vendee or Any Other Person in Possession of a Vessel as Ostensible Owner.

The mortgagee is in much the same position as an owner who charters his boat to a charterer. He gives possession, ostensible ownership and the power to deal with repairmen to the mortgagor. The charterer is a person named in subsection Q of Ch. 250, Section 30 (41 Stat. 1005, 46 U. S. C. A. Sec. 972), of the Ship Mortgage Act, being

> "The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted,"

and is presumed to have authority from the owner to procure repairs of supplies.

> *The Stjerneborg (Damskibsselskabet Dannebrog v. Signal Oil Co.)* (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197.

When we compare the position of the mortgagor in possession of a vessel with that of a charterer, we find that he too is a "person to whom the management of the vessel at the port of supply is entrusted." He has been allowed by the mortgagee to occupy a position in which the supplier would naturally regard him as authorized to pledge the credit of the vessel. He, too, is an ostensible owner who, just as the charterer, must be affirmatively and specifically prohibited from incurring liens or he has apparent authority to do so.

V.

The Maritime Lien Prevails in Charter Party Cases Unless the Person in Possession Is Specifically Prohibited From Incurring Liens.

Chartering owners have placed in most charter parties, a specific prohibition of the power of the charterer to create liens and subsection R of ch. 230, Section 30, 41 Stat. 1005, 46 U. S. C. A. Section 973, has placed upon the supplier the burden of ascertaining the authority of the person ordering the repairs, supplies or other necessaries. Thus, by the simple device of specifically prohibiting the lien in the instrument, the rights of the conflicting interests can definitely be determined.

Charter party cases have uniformly been decided by this Court on the basis of this rule of thumb: If the person in possession is unambiguously prohibited from creating a lien, the supplier cannot look to the credit of the vessel, and acquire rights superior to those of the chartering owner.

The South Coast (C. C. A. 9th, 1917), 247 Fed. 84 (affirmed 251 U. S. 519);

The Portland (C. C. A. 9th, 1921), 273 Fed. 401;

The Golden Gate (C. C. A. 9th, 1931), 52 F. 2d 397 (cert. den. 284 U. S. 682, 52 S. Ct. 199, 76 L. Ed. 576);

The Luddco 41 (C. C. A. 9th, 1933), 66 F. 2d 997, 1933 A. M. C. 1446.

The Supreme Court has likewise used the same rule of thumb when it affirmed *The South Coast* (1919), 251

U. S. 519, 40 S. Ct. 233, 64 L. Ed. 386, and decided the case of *United States v. Carver* (1923), 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361.

In the *South Coast* case, the charterer was held to have been implicitly authorized to create liens by an indemnity agreement and an acceleration clause, which provided for termination of the charter party if the charterer failed to discharge the ship's debts in thirty days. (Please note the similarity in the *South Coast* case to the acceleration clause incorporated by Appellee!)

In the *Carver* case, the charter party expressly prohibited liens, and the materialmen's liens were invalid against the owner.

In the *Stjerneborg* case (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197 (affirming the Ninth Circuit's decision, 106 F. 2d 896), the Court, in discussing the point, said at pages 274, 275:

> "When the charter party was examined to see if it prohibited liens it was found that it did not do so; it recognized the possibility of liens. It provided that the owner might retake the vessel in case of the failure of the charterer to discharge within thirty days any debt which was a lien upon it and
>
> *(275)
>
> also for a surrender of the *vessel free of liens upon the charterer's failure to make certain payments.
>
> We think that the fair import of our decision in The South Coast is that when the charterer has the direction and control of the vessel and it is his busi-

ness to provide necessary supplies, and the charter party does not prohibit the creation of a maritime lien therefor, the materialman is entitled to furnish the supplies upon the credit of the vessel as well as upon that of the charterer and the lien is not defeated by the fact that the charterer has promised the owner to pay.

When, however, the charter party, with knowledge of which the materialman is charged, prohibits the creation of a lien for supplies ordered by the charterer or the charterer's representative, no lien will attach. This was decided in United States v. Carver, 260 U. S. 482, 67 L. Ed. 361, 43 S. Ct. 181. That was a case of vessels owned by the United States. The charterer, whose representative had ordered the supplies, had agreed that it would 'not suffer nor permit any lien' which might have priority over the title and interest of the owner."

"The court found a difference between the language of the charter party in the Carver Case and that used in The

*(276)

South *Coast. In the Carver case 'the primary undertaking' was that 'a lien shall not be imposed.' *The lien was denied, not because the charterer was bound to provide and pay for supplies but because the charter party prohibited the lien.* To the same effect is the decision in the case of the St. Johns. Colonial Beach Co. v. Quemahoning Coal Co., 260 U. S. 707, 67 L. Ed. 474, 43 S. Ct. 246." (Emphasis added.)

VI.

The "Charter Party Rule" Is Followed When the Lien Holder Has Dealt With Other Persons Who Are in Possession as Ostensible Owners.

The Supreme Court and the Court of Appeals for the Ninth Circuit have become firmly committed to the perfectly sound principle that the lien holder prevails unless the person in possession is specifically prohibited from imposing any lien by the terms of the document by virtue of which he is in possession. The identical reasoning is applicable to other situations in which the person in possession seeks to operate on the vessel's credit. Thus, the vendee under a conditional sales contract is in possession as ostensible owner and unless specifically prohibited, can incur liens senior to the interest of the vendor.

In the case of *Munson Inland Water Lines v. Seidl* (C. C. A. 7th, 1934), 71 F. 2d 791 (cert. den. 293 U. S. 606, 55 S. Ct. 123, 79 L. Ed. 697), the conditional sales contract did not expressly prohibit the vendee in possession from incurring liens, but did contain an undertaking that the vendee keep the vessel free from liens while the title was in vendor. The Court, on the authority of *The South Coast* (1919), 251 U. S. 519, 40 S. Ct. 233, 64 L. Ed. 474, and *United States v. Carver* (1923), 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361, concluded that an express prohibition was necessary, and that authority by implication was sufficient to allow imposition of liens by the person in possession.

In the case of *The Luddco 41* (C. C. A. 9th, 1933), 66 F. 2d 997, the vessel was in possession of a sales corporation, upon a consignment contract, by which the sales corporation was to use it for demonstration purposes, and defray costs of upkeep. The Ninth Circuit cases of *The*

South Coast (C. C. A. 9th, 1917), 247 Fed. 84 (Affirmed 251 U. S. 519), *The Portland* (C. C. A. 9th, 1921), 213 Fed. 401, and *The Golden Gate* (C. C. A. 9th, 1931), 52 F. 2d 397 (cert. den. 284 U. S. 682, 52 S. Ct. 199, 76 L. Ed. 576, were ample precedent for this Court to hold that where the person in possession has authority to create liens, reasonably implied from the contract, the liens he incurs are paramount. This case was questioned by the Eastern District Court of New York in the case of *The Pajala* (E. D. N. Y., 1934), 7 Fed. Supp. 618, but the *Pajala* was expressly overruled by the Supreme Court's reaction to the identical fact situation in the *Stjerneborg*. (See footnote 6 in the *Stjerneborg* case, 310 U. S. 277, 278.)

VII.

The Same Principles by Which Charter Party and Similar Cases Are Decided Governs Contests Between Maritime Lien Holders and Mortgagees.

What of the situation when the contest is between the person who supplies goods, repairs and necessaries at the request of the mortgagor in possession, and the mortgagee who holds a valid preferred mortgage, duly recorded and endorsed on the ship's documents? This is the case before the Court.

Robinson on Admiralty, Section 64, page 451, states that this conflict is resolved on precisely the same basis governing the charter party cases:

> "64. Disputes concerning the authority of a mortgagor who is left in possession of the mortgaged vessel further to pledge the ship's credit are similar to those concerning the authority of a charterer to do the same thing.

"If the mortgagor remains in possession of the vessel or vessels and operates them, as he so frequently does, dispute is bound to arise in much the same manner that it does between the owner and the charterer with reference to liens occurring in the normal use of the vessel. In *The Morse Dry Dock and Repair Co. v. The Northern Star* case (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, noted 1927 Boston U. Law Review 46, one of the covenants of the mortgage stipulated that the mortgagor should not suffer or permit to be continued any lien that might have priority over the mortgage and in any case within fifteen days after the same became due he was to satisfy the lien. The Court felt that this did not preclude the arising of a lien. At page 554, of 271 U. S., at page 589 of 46 S. Ct.: 'The most that such a contract can do is postpone the claim of a party chargeable with notice of it to that of the mortgage.' *If, of course, the person in charge of the vessel has no authority to pile up liens upon it,* and the party claiming the lien knows of this or can be charged with notice the problem of the priority does not arise at all. The question is whether any lien arises at all and *the problem in general is the same as that already brought out in Section 53 in respect to charterer and owner.*" (Emphasis added.)

We might note that in Section 53, pages 390 *et seq.,* to which *Robinson* refers, he has analyzed *The Golden Gate* (C. C. A. 9th, 1931), 52 F. 2d 387 (cert. den. 284 U. S. 682, 52 S. Ct. 199, 76 L. Ed. 576; and *The South Coast* (1919), 251 U. S. 519, 40 S. Ct. 233, 64 L. Ed. 386, and has also forecast the reasoning of *The Stjerneborg* (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197 (affirming (C. C. A. 9th, 1939), 106 F. 2d 896).

Mortgage cases involving this contest are met somewhat less frequently. The foresight of draftsmen of preferred mortgages has prompted inclusion of express lien prohibitions. In the case of *The Henry W. Breger* (D. C. Md. 1927), 17 F. 2d 423, the Court had before it, a number of conflicting claims, including that of the Wittenberg Coal Co. for supplies (discussed at page 432). By the preferred ship mortgage, the mortgagor was specifically denied the authority to create "any liens whatsoever other than for crew's wages, *supplies* or salvage" (emphasis added). The Court said at page 432:

> "Obviously this section clothed the mortgagor or master of the vessel with power to create an indebtedness for supplies, and to subject the vessel to a lien therefor. The master was thereby enabled, wherever the vessel might be, to pledge her credit, not only to raise money to pay the crew, but also to buy the necessary supplies. Moreover, in order to make this authority practically effective, the lien was intended to have priority over that of the mortgage. The authority to purchase supplies is grouped in the same clause with the authority to impose liens upon the vessel for wages or salvage, which, under the Ship Mortgage Act, give rise to preferred maritime liens. It is therefore, a fair conclusion that the parties to the mortgage intended to put all three liens in the same category. Subsection S of Section 30 of the act (Comp. St. 8146¼ppp) provides that nothing in Section 30 of the act shall be construed to prevent the mortgagee from waiving his right to a lien, or, in the case of a preferred mortgage lien, to the preferred status of such a lien, at any time by agreement or otherwise.
>
> *The tacit permission given by the mortgagee to the imposition of a lien on the ship for supplies is pro*

tanto a waiver on the part of the mortgagee of the preferred status of the preferred mortgage lien. The claim of the Wittenberg Coal Company has priority over the mortgage." (Emphasis added.)

In the case of *The Bergen* (C. C. A. 9th, 1933), 64 F. 2d 877, 1933 A. M. C. 877, this Court held that when the preferred mortgage specifically prohibits liens, the lien for supplies arises, but will be postponed to the lien of the mortgage. It is apparent that but for the prohibiting clause, the supplier's lien would have been senior to the mortgage.

This Court followed the reasoning of the Supreme Court in the case of *Morse Dry Dock and Repair Co. v. Northern Star* (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, in which there was a specific prohibition of the authority of the mortgagor in possession to incur any lien that would have priority over the mortgage. The Supreme Court said at page 554:

"The owner of course had 'authority to bind the vessel' by virtue of his title without the aid of statute. The only importance of the statute was to get rid of the necessity for a special contract or for evidence that credit was given to the vessel. Subsection R, being Comp. St. Ann. Supp. 1923, 8146¼pp, it is true, after providing that certain officers shall be included among those presumed to have authority from the owner to create a lien for supplies goes on that 'nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel

> therefor.' But even if this language be construed as dealing with anything more than the authority of a third person to represent the owner so as to create a lien, still when supplies are ordered by the owner the statute does not attempt to forbid a lien simply because the owner has contracted with a mortgagee not to give any paramount security on the ship The most that such a contract can do is to postpone the claim of a party chargeable with notice of it to that of the mortgagee."

Thus, the mortgagor in possession has *power* to create liens. If his authority is specifically prohibited by the mortgage, the lien he creates is "postponed" to the lien of the mortgagee. Conversely, if the authority is not specifically prohibited, the lien he creates is not postponed to that of the mortgagee, but ranks it. The postponement is based only on the express prohibition.

In the case of *Eagle Star and British Dominions v. Tadlock* (S. D. Cal., 1938), 22 Fed. Supp. 545, Judge Yankwich had before him a case in which the contest was between a supplier of necessaries and a mortgagee who had evidently used the same Customs Form No. 1348 of the Treasury Department Appellee chose in this case. It provided that the mortgagee could declare a default in case the owner permitted the vessel "to be run in debt to an amount not exceeding in the aggregate of *No* Dollars." On the authority of 46 U. S. C. A. Secs. 971, 973, *The Yankee* (1916, 3 Cir.), 233 Fed. 919 (cert. den. 243 U. S. 649, 37 S. Ct. 476, 61 L. Ed. 946); *The Luddco 41* (1933, 9 Cir.), 66 F. 2d 997; *Morse Dry Dock Co. v. Northern Star* (1926), 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082, he held that the supplier's lien was valid and superior to the mortgagee's rights under the mortgage.

The case was affirmed by this Court in *Walsh v. Tadlock* (C. C. A. 9th, 1939), 104 F. 2d 131, without much discussion of the point other than to say that "the seniority of the latter's maritime lien was recognized." Certiorari was denied by the Supreme Court, 308 U. S. 584, 60 S. Ct. 107, 84 L. Ed. 489.

VIII.

The Supplier Is Bound Only by What He Knew or Would Have Learned by Reasonable Diligence.

The Statute (Subsec. R of Ch. 250, Sec. 30, 41 Stat. 1005, June 5, 1920; 46 U. S. C. A., Sec. 973) provides that the person furnishing repairs, supplies and necessaries to a vessel on order of one of the persons designated in Subsection Q of the same section (46 U. S. C. A., Sec. 972) is bound by what he knew or by the exercise of reasonable diligence could have ascertained concerning the authority of the person ordering the repairs, supplies or other necessaries. If "because of the terms of a charter party, agreement for sale of the vessel, or for any other reason the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor" no lien is conferred. With this Appellants have no quarrel. (*The Admiral Goodrich (Shell Co. of Calif. v. Pacific S. S. Co.)* (C. C. A. 9th, 1923), 288 Fed. 362.)

Reasonable inquiry either did disclose, in the case of Appellant Crofton, or would have disclosed in the case of Appellant Larson, that there existed on file in The Office of the Collector of Customs at Tacoma, and endorsed upon the ship's papers, two documents calling themselves "preferred" mortgages [Libelant's Exhibits 7 and 8]. Appellants concede that they are bound by the terms of

those documents. They contain no express prohibition of the authority of the mortgagor in possession to incur liens. The provision with reference to liens by which Appellants are bound reads:

> "If said first parties shall suffer and permit the Vessel to be run into debt to an amount exceeding the aggregate of *a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of the date incurred* . . . second party is hereby authorized to take possession of said goods." (Italicized portion is typewritten, balance is printed form.)

What does it mean? Should the ambiguous language be interpreted most strongly against the party selecting it?

The Supreme Court, in the case of *The Stjerneborg, (Dampskibsselskabet Dannebrog v. Signal Oil Co.)* (1940), 310 U. S. 268, 60 S. Ct. 937, 84 L. Ed. 1197, said that it is not necessary for the supplier to resolve the ambiguous provision of a charter party at his peril (at p. 280):

> "We are of the opinion that it would thwart the purpose of the statute to compel the materialman furnishing supplies to resolve the ambiguities which may be found in such charters as those involved here. The Statute was intended to afford the materialman a reasonably certain criterion. The owner has a simple and ready means of protection. *All that it is necessary for him to do, as the materialman in dealing with the charterer is charged with notice of the charter, is to provide therein that the creation of maritime liens is prohibited.* When the owner does

not do so, he should not be heard to complain when it appears that it is the charterer's business to obtain supplies to keep the vessel on her way and the charter has not prohibited reliance on the credit of the vessel." (Emphasis added.)

To the same effect is the case of *Virginia Shipbuilding Corp. v. U. S. Shipping Board Emergency Fleet Corp.* (E. D. Va., 1925), 11 F. 2d 156.

IX.

The Only Reasonable Interpretation of the Provision in the Mortgage Is That the Mortgagor in Possession Is Authorized to Incur Liens.

In the District Court, Appellee naively described the clause as "merely an acceleration clause." Appellants assume that now Appellee will concede that this ambiguous provision leaves something to be desired in the way of accuracy of expression. Appellants urge strongly that a careful analysis of the clause may clear up some of its uncertainty. Use of the expression "permit said vessel to be run in debt" is consistent only with the understanding by the parties that the vessel's credit is to be used for "strictly current operation and repairs." The very use of the printed form No. 1348, designed for vessels under 200 tons and developed when mortgagees could not protect themselves from liens incurred by mortgagors in possession, corroborates this interpretation. The form, it must be remembered, was used in situations when mortgagors could impose liens and mortgagees sought to protect themselves against too many of the liens they could not prevent. The very language used assumes that the mortgagor can and will "run the vessel in debt" *i. e.* incur maritime liens for operating expenses and repairs.

It merely seeks to set a thirty day limitation on the time within which these liens must be paid.

Appellees should not now be heard to complain that Appellants' liens, incurred while they allowed the "vessel to be run in debt," are senior to their mortgage security. The authority of the persons in charge of the boat, as conferred by the document by virtue of which they are in possession, not only impliedly authorizes them to incur liens, it expressly authorizes them to run the vessel "in debt" and incur a reasonable sum "for strictly current operation and repairs." True enough, to prevent the acceleration clause from operating, they would have had to pay off these liens within thirty days, but if the liens for goods, wares and repairs were incurred, they were to be valid liens, valid at least for thirty days. Under no precedent Appellants can locate, can these "30 day liens," once attaching, be divested. The key to the conflict, as stated by this Court in many cases, by the Supreme Court and by the District Courts and Courts of Appeals of others circuits, is simply this: If the document, by virtue of which a person has possession of a vessel, prohibits him from incurring any liens, the supplier does not obtain a senior lien; if that document authorizes liens, impliedly or expressly, the supplier's lien is paramount to the rights of the mortgagee, the chartering owner, the conditional vendor or any person who has placed another in charge of the vessel. Here, the person in possession is authorized, at least impliedly, to create liens by the ambiguity of the document. The suppliers' liens are therefore paramount.

X.

The Balance of the Equities Is in Favor of Appellants.

In situations in which the Courts have found two or more conflicting equities, or in which policy favors both sides of a contest over funds, Courts generally have been inclined to resolve the conflict by inquiring as to what each of the two deserving parties could have done to protect himself, and what parties similarly situated in the future can do to avoid similar loss.

In this case it is helpful to see what each of these parties could have done. The suppliers could follow the statute, examine the ship's documents and the Custom House records. They would then find Appellee's mortgages, which attempt to lift themselves by the boot strap designation, "preferred." They would, if careful, examine the terms and find that the mortgagors in possession are authorized to run the vessel "in debt" and incur reasonable sums for "strictly current operation and repairs." They would see that the mortgagor was obligated to pay the bills in thirty days. Undoubtedly, if they had any qualms about the obligations extending any substantial time over thirty days, they would not make the repairs or furnish the supplies. Furnishing credit to the vessel under these circumstances is understandably the act of a reasonably cautious supplier.

The mortgagee, on the other hand, does not want the credit of the vessel to be impaired or used. In order to restrict the mortgagor to operation of the vessel on his own credit, he has only to insert the specific prohibition in his mortgage: "Neither the mortgagor nor the master is authorized to suffer any lien to be placed upon the vessel during the term of this mortgage." He may reach

the same result by paying a dollar or two for a carefully drafted printed form of preferred ship's mortgage [see Art. V, Crofton's Exhibit "A," A. 38]. Any form worthy of the name contains the prohibiting clause. Balancing the opportunities in this case, Appellants had much less opportunity to avoid loss of the security of their liens than Appellee, who so simply could have protected its mortgage.

XI.

Appellee Has Waived Whatever Preferred Mortgage Lien It Might Have Had.

Appellants refer the Court to Subsection S of Chapter 250, Section 30, 41 Stat. 1005, June 5, 1920 (46 U. S. C. A., Sec. 974):

> "Nothing in this chapter shall be construed to prevent . . . the furnisher of repairs, supplies, towage, use of a dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise."

In the case of *The Henry W. Breger* (D. C. Md., 1927), 17 F. 2d 423, the Court talks in terms of waiver *pro tanto* by the "tacit permission given by the mortgagee to the imposition of a lien on the ship for supplies." In this case, there is likewise a "tacit permission" given by the mortgagee to the mortgagor in possession to run the vessel "in debt" and to incur "a reasonable sum for strictly current operation and repairs to be kept currently

paid within 30 days of date incurred." This is a waiver *pro tanto* of the preferred status of the mortgage. The mortgagee, under the statute, can waive the preferred status of the mortgage lien "at any time by agreement or otherwise." He has done so here by his choice of language in the mortgage. He has tacitly authorized "30 day" liens!

XII.
Conclusion.

The District Court's Decree Is Erroneous and Should Be Reversed or Modified.

Appellants have good and valid maritime liens for goods, wares and services furnished the vessel upon order of persons designated by the Statute as authorized to procure repairs, supplies and necessaries. They were persons entrusted with the vessel. No specific prohibition of their authority to create liens appears in Appellee's "preferred" mortgages. There is at least an ambiguity in the use of the language "permit the vessel to be run in debt to an amount exceeding the sum of a reasonable sum for strictly current operation and repairs to be kept currently paid within 30 days of the date incurred." If this language does not amount to an express authorization to run the vessel in debt to an amount *not* exceeding such reasonable sum, it is at least ambiguous language to be construed most strongly against the person selecting it. Appellants were therefore dealing with persons who had express or implied authority to order the supplies and have valid liens senior to the Appellee's mortgage liens.

Appellants' liens were adjudged junior to Appellee's mortgages. In this the District Court erred. This Court can correct the error by reversal of the Final Decree and remand for further proceedings as to disposition of the proceeds of sale. As an alternative, if this Court finds that Appellants' liens are senior to Appellee's mortgages, opportunity for a stipulated decree here could be afforded.

Respectfully submitted,

EKDALE, SHALLENBERGER & TONER,
By ARCH E. EKDALE,
GORDON P. SHALLENBERGER,
GEORGE E. TONER,
Attorneys for Appellants.

APPENDIX.

46 U. S. C. A., Section 922.

Section 922. Preferred mortgages.

(a) A valid mortgage which at the time it is made, includes the whole of any vessel of the United States (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than two hundred gross tons), shall, in addition, have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of section 953 of this title, if—

(1) The mortgage is endorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in section 921 of this title, together with the time and date when the mortgage is so endorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States and for the purposes of this section the Reconstruction Finance Corporation shall, in addition to those designated in sections 888 and 802 of this title, be deemed a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this section is

hereafter in this chapter called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this section.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for a vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the por-

tion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit *in rem* in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage. June 5, 1920, c. 250, Sec. 30, subsec. D, 41 Stat. 1000; June 27, 1935, c. 319, 49 Stat. 424.

46 U. S. C. A. Section 953.

Section 953. Preferred maritime lien; priorities; other liens.

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities to the proceeds of sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court. June 5, 1920, c. 250, Sec. 30, subsec. M, 41 Stat. 1004.

46 U. S. C. A. Section 971:

Section 971. Persons entitled to lien.

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. June 5, 1920, c. 250, Sec. 30, subsec. P, 41 Stat. 1005.

46 U. S. C. A. Section 972:

Section 972. Persons authorized to procure repairs, supplies, and necessaries.

The following persons shall be presumed to have authority from the owner to procure repairs, supplies, tow-

age, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel. June 5, 1920, c. 250, Sec. 30, subsec. Q, 41 Stat. 1005.

46 U. S. C. A. Section 973:

Section 973. Notice to persons furnishing repairs, supplies, and necessaries.

The officers and agents of a vessel specified in Section 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor. June 5, 1920, c. 250, Sec. 30, subsec. R, 41 Stat. 1005.

46 U. S. C. A. Section 974:

Section 974. Waiver of right to lien.

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a

preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States. June 5, 1920, c. 250, Sec. 30, subsec. S, 41 Stat. 1005.